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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 743

A. A. LEWIS AND COMPANY, MAIN AND LINCOLN AVENUE SUBDIVISION, TRUST NO. 1523, CENTRAL REPUBLIC TRUST COMPANY, FORMERLY NAMED CENTRAL REPUBLIC BANK AND TRUST COMPANY, AS SUCCESSOR TRUSTEE BY CONSOLIDATION, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 36–38) is unreported. The Circuit Court of Appeals reversed the decision of the Board without written opinion. (R. 53.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 18, 1936. (R. 53.) Petition for a writ of certiorari was filed February 18, 1937, and was granted March 29, 1937. (R. 55.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trust in question is an "association" within the meaning of Section 701 (a) (2) of the Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved, together with subsequent changes in the regulations, are set out in the Appendix, *infra*, pp. 23–31.

STATEMENT

The following facts are taken from the Board's memorandum opinion (R. 36–38), and from the trust instrument and the agreement attached thereto (R. 13–36):

On December 12, 1925, Minerva S. Melidones was the owner of certain undeveloped real estate and on that date, for the purpose of subdividing and selling the same, she entered into two written agreements affecting the property. One of the agreements, designated "Declaration of Trust", provided for the placing of title in the Chicago

Trust Company (predecessor of Central Republic Trust Company) as trustee for the ultimate use and benefit of Minerva S. Melidones and A. A. Lewis, both of whom signed the trust instrument as beneficiaries of the trust. (R. 13, 17, 36.)

The pertinent provisions of the trust instrument may be summarized as follows: That the trustee will hold the property and the proceeds, profits and avails thereof for the use and benefit of the beneficiaries. That it is agreed among the parties and by any persons who may become entitled to any interest under the trust that the interests of the beneficiaries shall consist solely of a power of direction to deal with the title to the property and the right to receive the proceeds from rentals or from sales; that such right in the avails of the property shall be deemed to be personal property and may be assigned and transferred as such; that it was the intention of the parties to vest full legal and equitable title in the trustee; that the trustee is sole owner of the property, and so far as the public is concerned has full power to deal with it, but that it is understood and agreed by the parties and any persons who may hereafter become parties to the agreement that the trustee in dealing with the title to the property will follow the directions of the trust manager or such persons as may be beneficiaries at the time; that transferable certificates evidencing the interests of the beneficiaries may be issued by the trustee, and that thereafter valid as-

signments of beneficial interests may only be had by surrender of old certificates of interest to the trustee and issuance of new certificates in exchange by the trustee; that the beneficiaries shall have the management and control of the property; and that if any property remains in the trust twenty years from date it shall be sold at public sale by the trustee and the proceeds divided among those entitled thereto under the trust agreement. (R. 13–17.)

Under an agreement which was attached to the trust instrument and which was executed by Minerva S. Melidones, A. A. Lewis and the trustee, Lewis was appointed "manager of the trust" and was granted "such powers and duties in connection with the administration of said trust as may be necessary to facilitate the sale of said land." (R. 22–23.) The agreement was made irrevocable for a defined period (R. 22), and Lewis was given a specific interest in all sales contracts (R. 32). Among the powers specifically delegated were the following: To exercise management and control of the trust property for the purpose of selling it; to employ a sales organization; to select and approve purchasers for the lots, both as to character and financial responsibility, and to enter into contracts with the purchasers in the name of the trust as "manager" of said trust; to request the trustee to execute deeds and other necessary instruments. The trustee agreed to convey title to purchasers of lots upon the written direction of Lewis. (R. 17–36, 37.)

The agreement provided that it should not be construed as creating a partnership and that it should not be placed of record. (R. 33.)

The Commissioner of Internal Revenue classified the trust as an association and determined a deficiency of $512.30 for the year 1931. The Board of Tax Appeals held that the trust was not an association within the meaning of Section 701 (a) (2) of the Revenue Act of 1928. (R. 36–38.) This action was reversed by the Circuit Court of Appeals, on the authority of *Morrissey* v. *Commissioner,* 296 U. S. 344, which had been decided subsequent to the decision of the Board of Tax Appeals. (R. 53.)

SUMMARY OF ARGUMENT

I. The trust is taxable as an association since it is engaged in carrying on a business enterprise, and possesses the requisite attributes: title vested in the trustee, centralized management, continuity of existence despite death or change in beneficial ownership, and limited liability.

Reservation of control in the beneficiaries, if here effected, does not make the trust any the less an association.

II. The trust is an association despite the fact that there is technically but one trustee. The trust here has more than one beneficiary. But, assuming that it only has one, the trust is nonetheless an association.

ARGUMENT

I

THE TRUST MEETS ALL THE ESSENTIAL TESTS OF AN ASSOCIATION LAID DOWN IN THE RECENT DECISIONS OF THIS COURT

The sole question presented herein is whether the trust in question is an "association" within the meaning of Section 701 (a) (2) of the Revenue Act of 1928, *infra*, and hence is to be taxed as a corporation. That section defines a corporation as including "associations, joint-stock companies, and insurance companies", but the term "association" is not defined.

The problem of determining whether a trust is an association within the meaning of the taxing statutes has been a recurring one since the enactment of the Revenue Act of 1913. The question first came before this Court in *Crocker* v. *Malley*, 249 U. S. 223. That case involved a so-called "Massachusetts Trust" and arose under the Revenue Act of 1913, which imposed a tax upon the net income of "every corporation, joint-stock company or association", and the Court concluded that the trust was a pure trust and not an association, because the beneficiaries had no control. Later, the same trust agreement, with modifications, as was involved in the *Crocker* case was before the Court in *Hecht* v. *Malley*, 265 U. S. 144. That case involved taxes levied under the Revenue Act of 1918, where the term "corporation", as under the Revenue Act of 1928, was defined as including "as-

sociations, joint-stock companies, and insurance companies", and this Court held that regardless of control by the beneficiaries a trust was taxable as an association if the trustees were "associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises" (p. 161).

After the decision in the *Hecht* case, numerous cases were brought before the Board and the courts, but few of the decisions could be reconciled. In order to resolve the conflict, this Court, on May 13, and October 14, 1935, granted certiorari in four cases, namely: *Morrissey* v. *Commissioner,* 296 U. S. 344; *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369; *Helvering* v. *Combs,* 296 U. S. 365; and *Swanson* v. *Commissioner,* 296 U. S. 362.[1] In the *Morrissey* case the Court analyzed with great care the historical background of the provisions of the Acts levying taxes upon associations and the regulations interpreting the same, reviewed previous decisions, and enunciated the rule that a trust is an association, taxable as a corporation, if—

1. It is created and maintained for the purpose of carrying on a business enterprise, and possesses the following attributes:

2. Title of the trust property vested in the trustee;

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[1] These cases, all in 296 U. S., will be hereinafter referred to by name without citation but with reference to any particular page.

3. Centralized management;

4. Continuity of existence without termination or interruption by death or changes in the ownership of beneficial interests;

5. Limited liability of the participants.

The trust here involved was engaged in a business enterprise, and the agreement of the parties forming the trust provided for the essential requisites of an association as set forth in the *Morrissey* case.

1. *The Business Enterprise*

The declaration of trust, and the contemporaneous agreement by Melidones (the former owner of the property), Lewis (the real estate operator), and the trustee, provided for the selling of real estate, by the familiar process of subdividing larger parcels. There can be no question that such dealing in real estate constitutes a business enterprise. *Morrissey* v. *Commissioner; Helvering* v. *Coleman-Gilbert Associates; Swanson* v. *Commissioner.* At the outset the trustee took title to at least four designated parcels, and was to take title to any other properties which might come into its hands by direction of the beneficiary, or beneficiaries. (R. 13, 17–19, 35.) The business of selling real estate lots from subdivisions was actively carried on. (R. 9, 11.) It can make no difference that the trustee, so far as the record indicates, did not take title to additional properties. *Swanson* v. *Commissioner,* at p. 365. Nor is it material that

the business here in question may have been a comparatively small one. As this Court said in the *Combs* case, where the parties had confined their operations to one oil well, "Parties may form an association for a small business as well as for a large one." *Helvering* v. *Combs,* at p. 368.

The petitioners admit, as they must, that the subdividing and selling of lots constitutes a business, but contend that Melidones was engaged in that business and not the trustee. (Pet. Brief, pp. 8–9.) They argue that the trustee was bound to follow the directions of such persons as might be beneficiaries, and had no discretion. This overlooks the clear and specific provisions that the trustee was to have full legal and equitable title to the real estate, the beneficiaries' interests in the proceeds from rentals or sales to be personalty (R. 14); and that the trustee was the "sole owner of the real estate", and, so far as the public was concerned, had "full power to deal with it" (R. 15).

But, in any event, if the parties could provide that the trustee hold all power publicly, and little power privately, and if for purposes of taxation only the private power can be considered, the most that can be said for petitioners' case is that the trustee in connection with the beneficiaries, Lewis and Melidones, was engaged in the business here involved. If the public powers of the trustee are not considered controlling, the declaration of trust and the agreement entered into in connection therewith provided for the carrying on of the business

by the trustee, in connection with the beneficiaries. The beneficiaries under the declaration of trust were to have the "management and control" of the property, and "the selling, renting and handling thereof." (R. 15.) And it was provided that the trustee was to deal with the property on instructions from the beneficiaries (R. 15). In accordance with such instructions the trustee was to make contracts of sales, conveyances, or otherwise deal with the title of the real estate (R. 15). Aside from such instructions, the trustee was to make collections from buyers, and distributions to beneficiaries, was to keep the books and records of the business and any other necessary data, and might issue certificates of beneficial interests and handle their transfer. (R. 14, 32–33.) It was contemplated also that the trustee, properly reimbursed, would defend suits for breach of contract, injury to person or property, and fines and penalties, and pay taxes, assessments, and insurance. (R. 14–16.)

Thus the trustee, under the control of the beneficiaries, was engaged in connection with the beneficiaries in the carrying on of the business.[2]

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[2] As this Court noted in *Hecht* v. *Malley*, 265 U. S. 144, 160, the language used *arguendo* in *Crocker* v. *Malley*, 249 U. S. 223, to the effect that there was no ground there for grouping together the beneficiaries and trustees in order to turn them into an association,

> is to be read in the light of the trust agreement there involved, under which the trustees were, in substance, merely holding property for the collection of the income and its distribution among the beneficiaries, and

Article 1314 of Regulations 74, *infra*, p. 24, which were applicable during the year here in question, provides in distinguishing a trust from an association, that a trust exists "where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or *in connection with the beneficiaries*, in the carrying on of any business, *and the beneficiaries have no control over the trust.*" (Italics ours.) The regulation further provides that an association exists if "the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise." Leaving aside the fact that there is only one trustee named in the declaration of trust, the effect of which fact is discussed *infra*, pp. 17–19, the trust here in question is an association within the plain meaning of Article 1314, for, first, the trustee carried on a business either by himself or in connection with the beneficiaries, and secondly, the beneficiaries controlled the trust. The particular provisions of the regulations here relied on remained substantially the same from 1925 until 1933. Regulations 65, Art. 1504, as amended by T. D. 3748, IV–2, Cumulative Bulletin 7; Regulations 69, Art. 1504; Regula-

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were not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, 190. And see *Smith* v. *Anderson*, L. R., 15 Ch. Div. 247.

tions 74, Art. 1314, *infra*, p. 24. Meanwhile Congress had persuasively indicated its approval of the provisions by reenacting without change the general provisions as to associations in the Revenue Acts of 1926 (44 Stat. 9), 1928 (45 Stat. 878), and 1932 (47 Stat. 289). *Morrissey* v. *Commissioner*, at p. 355.

2, 3. *Title to the Property Was Vested in the Trustee. Centralized Management Was Obtained*

There can be no question that title to the real estate was vested in the trustee. The trust instrument provides that it is the intention of the parties to vest full legal and equitable title to the property in the trustee (R. 14). The provision indicates the intention to create more than a mere naked trust, where the trustee has only legal title with equitable title in the beneficiaries. The further provision (R. 14) that the interests of the beneficiaries should be deemed personal property and in case of death should pass to their executors or administrators and not to their heirs at law negatives the presence of any interest of the beneficiaries in the property itself. Finally, the declaration of trust conclusively states (R. 14):

> that no beneficiary now has, and that no beneficiary hereunder at any time shall have, any right, title or interest in or to any portion of said real estate as such, but only an interest in the proceeds as aforesaid.

Centralized management was obtained by transferring the property to a trustee and appointing

Lewis the manager of the trust. By agreement among Lewis, Melidones, and the trustee, Lewis, designated as manager of the trust (R. 22), was given the power to exercise management and control of the trust property for the purpose of selling it (R. 23). The trustee, holding full title to the property, agreed to follow the directions of Lewis in the disposition of the property. (R. 15, 22, 24, 27–28.) Lewis thus directed the business enterprise which was carried on by both Lewis and the trustee. In this there is a similarity to the *Swanson* case, where the renting of apartments, the details of management, and the distribution of net income were committed to a firm engaged in the business of buying and selling real estate and managing properties.

Petitioners do not deny the centralization of management but argue that the centralization accomplished no more than Melidones would have done as simple owner. (Pet. Brief, p. 12.) Even if that were true, the fact remains that the trust arrangement achieved centralized management. In the *Coleman-Gilbert* case where co-owners of real estate declared themselves trustees and beneficiaries of a trust to operate apartment houses on the property, it was held that an association existed despite a specific finding that the co-owners as trustees conducted the business in the same manner as it had been conducted by the co-owners before the trust was formed. *Helvering* v. *Coleman-Gilbert*, at p. 373.

4. *The Trust Had Continuity of Existence without Termination or Interruption by Death or Changes in the Ownership of Beneficial Interests*

The declaration of trust made full and careful provision for continuation of the trust business for twenty years (R. 16) despite changes in the ownership of beneficial interests by death or transfer. It was specifically stated that the interest of any beneficiary in the proceeds from rentals or sales of the subdivisions should be personal property, transferable and assignable as such, and should pass upon death of a beneficiary to his executor or administrator and not to his heirs at law. The agreement among the trustee, Lewis, and Melidones was not to be construed as creating a partnership (R. 33). The trustee was empowered to issue certificates evidencing the interests of the beneficiaries, and thereafter beneficial interests were in effect to be transferred only on the books of the trustee (R. 14).

By means of these provisions the trust business continued without interruption, although meanwhile the interest of Melidones was first assigned to one Benjamin Schwartz, and then passed to his estate (R. 9). So too, presumably under the provisions of the agreement (R. 34), the business of the trust was not interrupted when the present trustee, Central Republic Trust Company, succeeded the former trustee, Chicago Trust Company (R. 4, 9).

5. *The Agreements Provided for the Limited Liability of Participants*

The parties to the agreements sought to avoid liability as partners by specific provision (R. 33) that their trust arrangement for the carrying on of the business of selling lots should not be construed as creating a partnership. The declaration of trust vests full legal and equitable title to the real estate in the trustee who, to use the words of the declaration, "so far as the public is concerned, has full power to deal with it." (R. 15.) Both the declaration of trust and the agreement made in connection with the declaration of trust which set forth in detail the control of the beneficiaries and the consequent limitations upon the full power of the trustee were not to be placed of record. (R. 15, 33.) It was contemplated that the trustee, as full owner, might become liable personally or as trustee for breaches of contract, injury to person or property, and for payment of taxes, fines or penalties. In such event the agreement provides for reimbursement out of the trust fund or by the beneficiaries to the trustee for expenses and liabilities incurred. (R. 14–16.) But the participants nowhere provided for their liability to the public, other than to agree to respect the rights of purchasers (R. 27).

Ordinarily the limitation of personal liability of participants would be inherent in the use of the trust for carrying on a business. *Morrissey* v. *Commissioner,* at p. 359; *Helvering* v. *Combs,* at p.

368. It may possibly be that because of the control over the trust, attempted to be reserved by the beneficiaries, they would be held to be personally liable in some States. But the purpose of the parties is to be drawn from their agreements (*Morrissey* v. *Commissioner,* at p. 361; *Helvering* v. *Coleman-Gilbert,* at pp. 373–374) and the agreements sought to avoid liability as partners, and to immunize the personal fortunes of the participants. In any event, the question of whether under local law the participants are individually liable is not determinative. See *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110.

The petitioners are not aided by the presence of control in the beneficiaries. They argue that this Court has found only "Massachusetts or business trusts" to be associations, and that the trust here is not a trust of that type because the beneficiaries had large powers over the trust. Assuming, *arguendo,* that the beneficiaries had large powers over the trust (see pp. 9–10, *supra*), the presence of such fact would make all the more clear the existence here of an association. As already pointed out, *supra,* p. 11, the regulations from 1925 until 1933 provided that a trust carrying on business is an association if the beneficiaries reserved positive control over the trust. Cf. the subsequent regulations, Regulations 77, Art. 1314, *infra,* p. 24; Regulations 86, Art. 801–3, *infra,* p. 26; Regulations 94, Art. 1001–3, *infra,* p. 28. Further, in *Hecht* v. *Malley, supra,* this Court held the Hecht and Hay-

market trusts there involved to be associations although in those trusts there was present a very large measure of control in the beneficiaries. See *Morrissey* v. *Commissioner*, at p. 352. Indeed as the discussion in the opinion in the *Morrissey* case points out, there was once some question whether a trust could be taxed as an association *where the beneficiaries reserved no control* (Cf. *Crocker* v. *Malley, supra*), but it is an entirely novel and untenable position under the statute, the applicable regulations, and the decisions of this Court to contend that a trust is not an association *because the beneficiaries reserved control.*

The law has never been, and it is respectfully submitted cannot be, that parties forming a trust to secure the inherent advantages of centralization of management, continuity of existence, and limited liability in carrying on a business can avoid taxation as an association by the mere process of reserving a further advantage—the right to direct the enterprise.

II

THE TRUST CANNOT ESCAPE TAXATION AS AN ASSOCIATION ON THE GROUND THAT THERE IS BUT ONE TRUSTEE AND ONE BENEFICIARY

We have shown that the trust is engaged in business, and that it has the essential attributes making it an association within the *Morrissey* case. Petitioners nevertheless argue that there can be no association where there is but one trustee and one beneficiary, which they contend is the situation in the case at bar.

Here there was one trustee in whom title to the real estate was vested. But there was also the manager of the trust, Lewis, who directed the administration of the business. The situation is not substantially dissimilar from that of plural trustees, with some, or one, more active in the business than the others. Cf. *Helvering* v. *Coleman-Gilbert Associates.*

Article 1314 of Regulation 74, *infra,* p. 24, does not appear to cover the case of a single trustee. Under later clarifying regulations, it is immaterial whether the property of the trust is conveyed to a single trustee or to several. Regulations 86, Art. 801–3, *infra,* p. 26; Regulations 94, Art. 1001–3, *infra,* p. 28; and see Section 704 (b) of the Revenue Act of 1928, 45 Stat. 880. Where the essential requisites of an association are present, Treasury rulings have held trusts to be associations despite the fact of but one trustee, especially where, as here, the trustee carried on the business in connection with the beneficiaries. See I. T. 2572, X–1 Cumulative Bulletin 200; G. C. M. 2405, VI–2 Cumulative Bulletin 10; S. M. 5382, V–1 Cumulative Bulletin 8. See also *Trust No. 5833, Security First Nat'l Bank* v. *Welch,* 54 F. (2d) 323 (C. C. A. 9th), certiorari denied, 286 U. S. 544. Groups doing a reciprocal or similar insurance business through an attorney-in-fact present an analogy to the case of a single trustee. These groups have been held to be associations. *Harris* v. *United States,* 51 F. (2d) 382 (S. D. Tex.). See also *Pickering* v. *Alyea-Nichols Co.,* 21 F. (2d) 501 (C. C. A. 7th), certiorari denied, 276 U. S. 617.

The essential attributes of an association—the carrying on of a business enterprise by means of a trust with the consequent corporate advantages of centralization of management, continuity of existence, and limited liability—are present in the trust here in question. In assimilating associations to corporations and not to individuals, Congress must be considered to have found its justification in the substantial resemblances between corporations and associations, and not to have made a distinction on what is more a matter of form than substance—the difference between a combination of one trustee and "trust manager" on the one hand and two trustees on the other. *Morrissey* v. *Commissioner.* The corporate advantages secured in the carrying on of the trust business are the same in either situation. See *Ittleson* v. *Anderson,* 67 F. (2d) 323, 325 (C. C. A. 2d) in which case the court said:

> Usually there are a number of trustees and of beneficiaries in a business trust, but there is no reason to say that every business trust must have more than one trustee and more than one beneficiary at all times.

It is argued that there is but one beneficiary to the trust. But the declaration of trust is explicit on this point and states that the trustee takes title to the real estate "for the ultimate use and benefit" of Melidones and Lewis (R. 13). The agreement made in connection with the declaration of trust also specifically treats both Lewis and Melidones as beneficiaries (R. 34). It may be true that the

interests of Lewis and Melidones in the proceeds of the business are different. But a corporation does not cease to pay taxes as a corporation because it has various classes of interests in the profits. Melidones contributed capital to the enterprise. Lewis contributed services—his managing and selling activities. The profits of the trust business arose no more from one than the other, but from the combination of both in association with the administration of the trustee so far as the public was concerned. An association may be small in numbers. *Swanson* v. *Commissioner*. *Helvering* v. *Coleman-Gilbert*, at p. 372.

But assuming what is not the fact, that there is but one beneficiary, the trust is nonetheless taxable as an association. The agreements of the parties contemplated that others might join in the enterprise. (R. 13, 14, 15.) In that event, the provision for transfer of certificates could be availed of. (R. 14.) New properties could be added to the trust. (R. 13.) The nature and purpose of the enterprise are to be gathered from the agreements of the parties. The enterprise here is within the description of this Court in the *Morrissey* case (p. 357):

> * * * But the nature and purpose of the cooperative undertaking will differentiate it from an ordinary trust. In what are called "business trusts" the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and

> sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; * * * where those who become beneficially interested, either by joining in the plan at the outset, *or by later participation* according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise. [Italics supplied.]

So here there might be later participation. Indeed the beneficial interest, which petitioners contend is the sole interest here, is presently held by the estate of Schwartz following an assignment from Melidones, the original owner, to Schwartz. Should this interest devolve into the hands of coowners (cf. *Helvering* v. *Coleman-Gilbert Associates*) or should others join in the enterprise, there would be several beneficiaries. But the nature, purpose, and scope of the enterprise would remain in substance the same. It is submitted that if the trust here would be an association then, it was one at its beginning and is one now.

Before concluding, one last point requires brief consideration. It is contended by petitioners that the purpose of setting up the trust was to secure the title of the real estate from vicissitudes in the hands of Melidones. But this contention, even if true, is the same as that present and of no avail in the *Swanson* case. *Swanson* v. *Commissioner,* at p. 363; see the Record in that case at p. 27. The par-

ties are not at liberty to narrow the purpose, scope, and nature of the enterprise as formally set forth in the instruments under which their activities were conducted. They may have wished to secure the title, but their purpose as declared in their agreements was much broader than that. Melidones, Lewis, and the trustee formed a combination to conduct the business of holding, improving, subdividing, and selling real estate. They made provision for centralized management, continuity of existence despite death or change in beneficial ownership, and for limited liability, and were not to become partners. See *Helvering* v. *Coleman-Gilbert,* at p. 374. The trust was engaged in a business enterprise and secured the main advantages of corporate activity.

CONCLUSION

It is respectfully submitted that the trust is taxable as an association. The decision of the Circuit Court of Appeals should be affirmed.

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APRIL 1937.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

The Revenue Act of 1928, c. 852, 45 Stat. 791, provides in part as follows:

> SEC. 701. DEFINITIONS.
>
> (a) When used in this Act—
>
> * * * * *
>
> (2) The term "corporation" includes associations, joint-stock companies, and insurance companies. (U. S. C., Title 26, Sec. 1696.)
>
> * * * * *

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 1312. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 701.

ART. 1314. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by sections 161–170 and by articles 861–891. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 701. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act.

We append the subsequent history of the above regulations for the convenience of the Court.

Article 1312 of Treasury Regulations 77, promulgated under the Revenue Act of 1932, is the same as Article 1312 of Regulations 74. But Article 1314 of Treasury Regulations 77 was changed to read as follows:

ART. 1314. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the

trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by sections 161–170 and by articles 861–891. Where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but have similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act.

Articles 801–2 and 801–3 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, are as follows:

ART. 801–2. *Association.*—The term "association" is not used in the Act in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within

the meaning of the Act, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

ART. 801-3. *Association distinguished from trust.*—The term "trust," as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages.

If a trust is an undertaking or arrangement conducted for income or profit, the

capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer", the use of a "seal", the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws", the existence of "control" by the beneficia-

ries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

Article 1001–2 of Treasury Regulations 94, promulgated under the Revenue Act of 1936, is the same as Article 801–2 of Regulations 86. But Article 1001–3 of Treasury Regulations 94 was changed to read as follows:

ART. 1001–3. *Association distinguished from trust.*—The term "trust," as used in

the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being sup-

plied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer", the use of a "seal", the

issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws", the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

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